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No. _____

IN THE

Supreme Court of the United States

CROWN CORK & SEAL COMPANY (DELAWARE), INC.,

Petitioner,

v.

COMPTROLLER OF THE TREASURY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Maryland Comptroller's assessment of corporate income tax against a non-domiciliary corporation that was not physically present in Maryland and did not direct any activity into Maryland violated either the Commerce Clause or the Due Process Clause of the United States Constitution.

RULE 29.6 STATEMENT

Prior to December 31, 1996, Crown Cork & Seal Company (Delaware), Inc. ("Crown") was a wholly-owned subsidiary of Crown Cork & Seal Company, Inc. Crown merged out of existence and into Crown Cork & Seal Company, Inc. on December 31, 1996.

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PETITION FOR A WRIT OF CERTIORARI

Crown Cork & Seal Company (Delaware), Inc. (hereinafter referred to as "Crown") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland (hereinafter referred to as the "Court of Appeals") in this matter.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is officially reported at 375 Md. 78, 825 A.2d 399 (2003). (Appendix to this Petition for a Writ of Certiorari ("App.") at 2a.) The order of the Court of Appeals that was issued on July 14, 2003, through which it denied Crown's petition for reconsideration, was not officially or unofficially reported. (App. at 1a.) The opinion of the Circuit Court for Baltimore City that was issued on March 17, 2000 was unofficially reported by Commerce Clearing House at CCH-MD-TAXRPTR ¶ 201-609. (App. at 46a.) The opinion of the Maryland Tax Court that was issued on April 26, 1999 was unofficially reported by Commerce Clearing House at CCH-MD-TAXRPTR ¶ 201-592. (App. at 72a.) The opinion of the Comptroller of the Treasury that was issued on February 25, 1997 was not officially or unofficially reported. (App. at 114a.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 2003. The order of the Court of Appeals denying Crown's motion for reconsideration was entered on July 14, 2003. (App. at 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and Rule 13(3) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides, in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, § 1, provides, in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The relevant portions of Md. Code Ann., Tax-Gen §§ 10-402, 10-811 and 13-523 are set forth at App. at 123a-126a.

STATEMENT OF THE CASE

A. Appeal Facts

Crown was a Delaware corporation with its principal place of business in Wilmington, Delaware. (App. at 74a; Record that is filed with the Court of Appeals in this matter ("R.") at E33.) Crown was organized in April 1989 to protect, maintain and manage certain patents and trademarks that were assigned to Crown by its parent corporation, Crown Cork and Seal Company, Inc. ("Parent"). (App. at 74a; R. at E71-E72 and E73-E74.)

Parent, a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania, was engaged in the manufacture and sale of metal cans, crowns and

closures for bottles, can filling machines and plastic bottles and containers. (R. at E33.) On June 13, 1989, Parent entered into a license agreement with Crown whereby Crown granted Parent a license to use certain patents and trademarks in Parent's manufacturing and sales activities in exchange for the payment of arm's-length royalties. (R. at E75-E82, E83-E87 and E88-E147.) During the tax years ended December 31, 1989 through December 31, 1993 (the "Tax Years"), Parent owned and operated three manufacturing plants in Maryland. (R. at E33.)

Crown did not conduct any business activities in Maryland, did not own or lease any tangible property in Maryland, did not have any employees in Maryland, did not maintain any bank accounts in Maryland and did not direct any economic activities into Maryland. (App. at 74a; R. at E33.) Crown conducted its business activities entirely within Delaware. Crown maintained its only corporate office in Delaware. In addition, Crown maintained its books and records, bank accounts and all tangible and intangible property in Delaware. Crown's employees conducted Crown's business exclusively within Delaware.

B. Procedural Facts

Maryland imposes its corporate income tax ("Tax") on a separate-company basis and thus, corporations compute their Tax by applying their separate-company apportionment factors to their separate-company income to compute their Maryland taxable income. Md. Code Ann., Tax-Gen. §§ 10-402 and 10-811.

Parent timely filed Tax returns and paid Tax for the Tax Years based on its Maryland activities. (R. at E33.) Crown

did not file Tax returns for the Tax Years based on its view that it was not subject to Tax in Maryland. Nonetheless, the Maryland Comptroller of the Treasury ("Comptroller") conducted an audit of Crown's books and records for the Tax Years. (R. at E36.) On May 13, 1996, the Comptroller issued a Notice of Assessment ("Assessment") against Crown through which the Comptroller determined that Crown should be subject to Tax and should be required to file Tax returns. (R. at E36.) Through the Assessment, the Comptroller assessed Tax of $759,263 for the Tax Years, plus applicable interest and penalties against Crown. (R. at E36.) In computing the Assessment, the Comptroller apportioned Crown's separate-company income to Maryland by applying the separate-company apportionment factors of Parent. (R. at E36.) The Comptroller reviewed and sustained the Assessment through its Notice of Final Determination. (App. at 114a-122a.)

Crown timely appealed the Comptroller's Final Determination by filing a Petition of Appeal with the Maryland Tax Court. (App. at 127a-132a; R. at E36.) The Maryland Tax Court reviews the Comptroller's factual and legal determinations on a *de novo* basis. Md. Code Ann., Tax-Gen. § 13-523. Through its petition to the Tax Court, Crown properly raised its Commerce Clause and Due Process Clause arguments with respect to the Assessment as follows: ". . . pursuant to both the Commerce Clause of the United States Constitution, and the Due Process Clause of the United States . . . Constitution, and court interpretations thereof, the Petitioner lacks the requisite nexus with the State of Maryland to be subject to corporate income taxation within this State" and "the [Comptroller] erred in using the Petitioner's *parent's* apportionment factors, in disregard of Sections 10-402 and 10-811 of the Tax-General Article of the Annotated Code of Maryland, and numerous court decisions precluding consolidated corporate tax filings

and mandating separate return treatment for members of an affiliated group of corporations." (App. at 130a-131a.) On April 26, 1999, the Tax Court issued decisions regarding Crown's appeal and two companion appeals, *SYL, Inc. v. Comptroller of the Treasury*, CCH-MD-TAXRPTR ¶ 201-591 (Md. Tax Ct., Apr. 26, 1999), *affirmed*, CCH-MD-TAXRPTR ¶ 201-610 (Cir. Ct. Baltimore City, Mar. 17, 2000), *reversed*, 375 Md. 78 (2003), *petition for a writ of cert. pending*, (U.S. Sup. Ct., Aug. 29, 2003), and *MCI International Telecommunications Corp. v. Comptroller*, CCH-MD-TAXRPTR ¶ 201-590 (Md. Tax Ct., Apr. 26, 1999), *affirmed*, CCH-MD-TAXRPTR ¶ 201-608 (Cir. Ct. Baltimore City, Mar. 17, 2000). In those appeals, the Tax Court determined that the Comptroller violated the Commerce Clause by imposing Tax on non-domiciliary corporations with no physical presence in Maryland based on the activities of in-state affiliates. (App. at 72a-75a, 76a-93a and 94a-113a.) The Tax Court concluded that Crown's "income producing activity all occurs outside of Maryland. . . . Parent is the only contact [Crown] has with Maryland and that contact is not sufficient to meet the substantial [nexus] requirement." (App. at 73a-74a.)

The Comptroller appealed the Tax Court's decision in favor of Crown by filing an appeal with the Circuit Court for Baltimore City. (R. at E1085.) Through its memorandum of law, Crown properly raised its Commerce Clause and Due Process Clause arguments with respect to the Comptroller's Assessment. (App. at 159a-164a.) On March 17, 2000, the Circuit Court affirmed the determination of the Tax Court that Crown lacked sufficient contacts with Maryland to justify Maryland's imposition of Tax. (App. at 46a-71a.) Specifically, the Circuit Court concluded that "there was no nexus between [Crown] and the State of Maryland." (App. at 64a.)

The Comptroller appealed the Circuit Court's decision in favor of Crown by filing an appeal with the Maryland Court of Special Appeals, an intermediate appellate court. (R. at E1106.) On September 13, 2000, the Court of Appeals, the court of last resort in Maryland, issued a writ of certiorari and accepted jurisdiction of the appeal on its own motion. (App. at 45a.) Through its brief, Crown properly raised its Commerce Clause and Due Process Clause arguments with respect to the Comptroller's Assessment. (App. at 199a-205a.) On June 9, 2003, the Court of Appeals reversed the decisions of the Circuit Court and the Tax Court and determined that the Comptroller's Assessment did not violate the Commerce Clause or the Due Process Clause. (App. at 2a-44a.) In particular, the Court of Appeals held: "the due process and commerce clauses do not allow states to tax a corporation's interstate activities unless there exists a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and a 'rational relationship between the income attributed to the State and the interstate values of the enterprise.'" (App. at 31a.) Further, the Court of Appeals quoted language from *NCR Corp. v. Comptroller of the Treasury*, 313 Md. 118, 146 (1988), as follows: "[The nexus p]rong . . . of the [Commerce Clause and Due Process Clause] test is satisfied by demonstrating the existence of a unitary business, part of which is carried on in the taxing state." (App. at 32a.) Based on its analysis, the Court of Appeals determined that Crown did not conduct substantial business activities in Delaware; had a unitary relationship with Parent, a corporation that conducted business in Maryland; and sustained the Comptroller's imposition of Tax against Crown that was computed using Parent's separate-company apportionment factors. (App. at 36a-43a.)

On July 9, 2003, Crown timely filed a petition for reconsideration with the Court of Appeals. (App. at 227a.) On July 14, 2003, the Court of Appeals denied that motion. (App. at 1a.)

REASONS FOR GRANTING THE PETITION

I. This Court should grant this petition to resolve the conflict among states regarding the proper nexus standard under the Commerce Clause with respect to the imposition of state corporation income taxes.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), this Court determined that the Commerce Clause and the Due Process Clause provide distinct limitations on the jurisdiction of states to impose tax on corporations engaged in interstate commerce. In particular, this Court held that the Commerce Clause prohibits a state from imposing a sales and use tax on a non-domiciliary corporation unless that corporation maintains a physical presence within the taxing state. *Id.* at 316-319.

Since this Court's decision in *Quill*, state courts, including several courts of last resort, have issued conflicting decisions regarding whether the bright-line standard of physical presence is applicable with respect to the imposition of state corporation income taxes or whether it is limited to sales and use taxes. Certain state courts have held that a state does not have jurisdiction to subject a non-domiciliary corporation to corporation income tax unless that corporation has some physical presence within that state. *See ACME Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 75 (Mo. 2002) (". . . in order for Appellants to be liable for taxes in Missouri, *they* must have had some activity: property,

payroll or sales, in the State of Missouri."). Other state courts have reached that same conclusion based on an analysis of the Commerce Clause and this Court's opinions in *Quill*, 504 U.S. 298, and *National Bellas Hess Corp. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967). *See J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000) (concluding that there was no basis for distinguishing between the Commerce Clause standard applied with respect to the sales and use tax in issue in *Quill* and the Commerce Clause standard that should be applied with respect to the Tennessee corporation income tax: "While it is true that the *Bellas Hess* and *Quill* decisions focused on use taxes, we find no basis for concluding that the analysis should be different . . . for franchise and excise taxes."); *Cerro Copper Products, Inc. v. Alabama Department of Revenue*, CCH-AL-TAXRPTR ¶ 200-517 (Ala. Dept. of Revenue, Admin. Law Div., Dec. 11, 1995) (". . . a state is prohibited by the Commerce Clause from taxing an out-of-state taxpayer unless the taxpayer has at least some physical presence in the state. . . . If the Taxpayer does not have sufficient nexus with Alabama for sales and use tax purposes, which it clearly does not have under *Quill*, then it is incongruous that the Taxpayer would have 'substantial nexus' to be subject to Alabama's franchise tax. As a practical matter, the same benefits of a bright-line, physical presence test cited in *Quill*, 504 U.S. at 1915, for sales and use tax purposes would also apply equally to other types of taxes."); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 300 (Tex. App. 2000), ("While the decisions in *Quill Corp.* and *Bellas Hess* involved sales and use taxes, we see no principled distinction when the basic issue remains whether the state can tax the corporation at all under the Commerce Clause. As construed in *Quill Corp.* and *Bellas Hess*, when the corporation conducts its activity solely

through interstate commerce and lacks any physical presence in the state, no sufficient nexus exists to permit the state to assess tax."); and *Guardian Industries Corp. v. Michigan Department of Treasury*, 198 Mich. App. 363, 377 (1993), *appeal denied, sub nom. Cargill, Inc. v. Department of Treasury*, 444 Mich. 934 (1994) (concluding that state taxing jurisdiction is established under the Commerce Clause only if a taxpayer maintains a physical presence in the state).

Conversely, certain state courts have held that the Commerce Clause "substantial nexus" test is satisfied if a business permits its intangible property to be used in the state. *See Geoffrey, Inc. v. South Carolina Tax Commission*, 313 S.C. 15, 18 (1993), *cert. denied*, 510 U.S. 992 (1993) (concluding that Geoffrey's intellectual property, i.e. its trade names and trademarks, was physically present in South Carolina: "It is well settled that the taxpayer need not have a tangible, physical presence in a state for income to be taxable there. The presence of intangible property alone is sufficient to establish nexus. . . . We hold that by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a "substantial nexus" with South Carolina."). Other state courts have gone even further by concluding that physical presence is wholly unnecessary under the United States Constitution and that the Commerce Clause "substantial nexus" test is satisfied if a business purposefully directs economic activity into a state's market. *See Kmart Properties, Inc. v. Taxation & Revenue Department*, CCH-NM-TAXRPTR ¶ 401-004 (N.M. Ct. App., Nov. 27, 2001), *cert. granted*, 131 N.M. 564 (2002) (". . . we believe that *Quill's* physical-presence requirement was intended to apply to sales and use taxes only; it was not intended to apply to other taxes such as a state income tax. . . . [T]he use of KPI's marks within New Mexico's economic market, for the

purpose of generating substantial income for KPI, establishes a sufficient nexus [under the Commerce Clause] between that income and the legitimate interests of the state and justifies the imposition of a state income tax."). Other state courts have noted in *dicta* that the Commerce Clause does not require physical presence, even though physical presence existed in the appeals under review. *See Couchot v. State Lottery Commission*, 74 Ohio St. 3d 417, 425 (1996), *cert. denied*, 519 U.S. 810 (1996) ("There is no indication in *Quill* that the Supreme Court will extend the physical-presence requirement to cases involving taxation measured by income derived from the state.") and *Borden Chemicals & Plastics, L.P. v. Zehnder*, 312 Ill. App. 3d 35, 44 (1st Dist. 2000), *review denied*, 189 Ill. 2d 656 (2000) ("We conclude that the requirement of a physical presence does not apply to the present case and, even if it did, plaintiff has a physical presence in the form of the Operating Partnership. . . . The *Quill* court merely carved out a narrow exception in the area of use tax collection duties.").

In addition to the conflicting conclusions and analyses of case law, there are currently a significant number of appeals pending in several states regarding the Commerce Clause "physical presence" issue. *See, e.g., Kmart, cert. granted*, 131 N.M. 564 (2002); *Lanco Inc. v. Director, Division of Taxation, appeal docketed*, No. 005329 (N.J. Tax Ct. 1997); *MCI International Telecommunications Corp. v. Comptroller*, CCH-MD-TAXRPTR ¶ 201-608 (Cir. Ct. Baltimore City, Mar. 17, 2000) (appeal stayed pending federal bankruptcy proceedings); *Pepsico, Inc. and Affiliates, appeal docketed*, No. 99-24-1-0130 (Iowa Dept. of Rev. and Fin.); and *Secretary of Revenue v. A&F Trademark, Inc.*, CCH-NC-TAXRPTR ¶ 202-146 (N.C. Tax Review Bd., May 7, 2002), *affirmed, sub nom. A&F Trademark, Inc. v. Tolson*, CCH-

NC-TAXRPTR ¶ 202-213 (N.C. Super. Ct., May 22, 2003), *appeal docketed*, No. 03-1203 (N.C. Ct. App., Sept. 11, 2003). Moreover, several states have enacted statutes, promulgated statutory regulations and adopted administrative publications that authorize the imposition of corporation income taxes with respect to non-domiciliary businesses without any physical presence if those businesses have "economic nexus" within the state. *See, e.g.*, N.C. Gen. Stat. § 105-130.7A; Arkansas Income Tax Reg. § 1996-3 ("A corporation which owns, licenses or manages intangible property has nexus with Arkansas for purposes of filing a corporate income tax return when the corporation seeks the benefit of economic contact with Arkansas by directing its economic activity at this State through the licensing of these intangibles in an intragroup intangible licensing transaction."); Fla. Admin. Code Ann. r. § 12C-1.011.1(p) ("The following activities . . . will be construed as conducting business . . . and corporations participating therein are subject to taxation[:] . . . selling or licensing the use of intangible property in Florida. . . ."); Iowa Admin. Code r. § 701 52.1(4) ("[C]orporations whose only connection with Iowa is their ownership of intangible property located or having a situs in Iowa are subject to Iowa income tax and must file an Iowa income tax return."); N.J. Admin. Code tit. 18:7-1.9; N.C. Admin. Code tit. 17, r. § 17:05C.0102(a)(5)(C); and Massachusetts Department of Revenue, Directive 96-2 (July 3, 1996) ("A foreign corporation's intangible property used within Massachusetts will subject that corporation to the corporate excise when: 1. The intangible property generates, or is otherwise a source of, gross receipts within the state for the corporation, including through a licensure or franchise; and 2. The activity through which the corporation obtains such gross receipts from its intangible property is purposeful (e.g., a contact with an in-state

company); and 3. The corporation's presence within the state, as indicated by its intangible property and its activities with respect to that property, is more than de minimis [sic]."). (App. at 242a-304a.) Further, this Court has been petitioned to resolve the Commerce Clause "physical-presence" issue on at least four occasions during recent years. *See J.C. Penney*, 531 U.S. 927; *Geoffrey*, 510 U.S. 992; *Couchot*, 519 U.S. 810; and *SYL*[1], 375 Md. 78, *petition for a writ of cert. pending*, (U.S. Sup. Ct., Aug. 29, 2003). This mounting conflict and indecision among the states regarding the proper nexus standard with respect to state corporation income taxes has inherently burdened interstate commerce in that corporations are unable to ascertain whether their interstate activities will subject them to state corporation income taxation.

In this matter, the Court of Appeals, the court of last resort in Maryland, has sanctioned the taxation of a non-domiciliary corporation, Crown, that did not have any physical presence in Maryland and did not purposefully direct any economic activity into Maryland.[2] Rather, the Court of

1. The Court of Appeals issued a single decision that included its opinion with respect to SYL and Crown. (App. at 2a-44a.) The facts in SYL are substantially different from the facts in this matter and thus, merit separate consideration by this Court.

2. This matter does not represent an isolated incident of Maryland exercising a far-reaching jurisdictional theory as evidenced by the fact that the Comptroller made and defended similar assessments of Tax against other non-domiciliary corporations. *See, e.g., MCI International Telecommunications Corp. v. Comptroller*, CCH-MD-TAXRPTR ¶ 201-590 (Md. Tax Ct., Apr. 26, 1999), *affirmed*, CCH-MD-TAXRPTR ¶ 201-608 (Cir. Ct. Baltimore City, Mar. 17, 2000); and *SYL, Inc. v. Comptroller of the Treasury*, CCH-MD-TAXRPTR ¶ 201-591 (Md. Tax Ct., Apr. 26, 1999), (Cont'd)

Appeals predicated jurisdiction based on its conclusion that Crown was affiliated with a unitary corporation that conducted business activities in Maryland and its determination that Crown did not conduct substantial business activities in Delaware. (App. at 36a-39a.) This matter represents the furthest reach of any state with respect to exercising corporation income taxing jurisdiction and presents an opportunity for this Court to resolve the increasing uncertainty with respect to limitations of the Commerce Clause. Therefore, this Court should grant this petition for a writ of certiorari to: 1) resolve the issue of whether physical presence is required under the Commerce Clause with respect to the imposition of state corporation income taxes; and 2) provide guidance regarding the meaning of "substantial nexus" with respect to the Commerce Clause jurisdictional requirements related to the imposition of state corporation income taxes.

II. This Court should grant this petition because the decision of the Court of Appeals conflicts with the prior decisions of this Court with respect to the application of the unitary business principle.

Through its decision, the Court of Appeals determined that requiring Crown, a non-domiciliary corporation without any physical presence or economic activities in Maryland,

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(Cont'd)
affirmed, CCH-MD-TAXRPTR ¶ 201-610 (Cir. Ct. Baltimore City, Mar. 17, 2000), *reversed*, 375 Md. 78 (2003), *petition for a writ of cert. pending*, (U.S. Sup. Ct., Aug. 29, 2003). In fact, the Maryland Comptroller has reviewed the operations of more than one hundred non-domiciliary corporations that it considers to have conducted business activities in a manner similar to Crown and has assessed Tax against all but one of those corporations. (R. at E925-E928.)

to file Tax returns and pay Tax did not violate the Commerce Clause or the Due Process Clause because Crown had a unitary relationship with Parent, an affiliated corporation that conducted business in Maryland. (App. at 36a-39a.) Moreover, the Court of Appeals sustained the Comptroller's Assessment through which the Comptroller computed Crown's Maryland taxable income by applying Parent's separate-company apportionment factors to the separate-company income of Crown. (App. at 43a.)

The unitary business principle was developed by this Court under the Commerce Clause and the Due Process Clause as a constitutionally-accepted method of determining taxable income for state corporation income tax purposes. *See, e.g., Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207 (1980); and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980). Under that principle, this Court has reviewed appeals in which states sought to tax income of corporations that was earned outside of the states' borders. In all of those appeals, the taxpaying corporation was physically conducting business in the taxing state. *See Exxon*, 447 U.S. at 224-225 (concluding that Wisconsin could tax the income that Exxon earned outside Wisconsin from refining, exploration and production activities because that income was unitary with the income that Exxon earned inside Wisconsin from marketing petroleum products); *Mobil*, 445 U.S. at 443-449 (concluding that Vermont could tax the dividend income that Mobil received from its subsidiary corporations because the business of the subsidiary corporations was unitary with the petroleum business that Mobil conducted in Vermont); *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 329 (1982) (concluding that Idaho had violated the Commerce Clause and Due Process Clause by attempting to

impose corporation income tax with respect to the dividend income that ASARCO received from its subsidiary corporations because the business of the subsidiary corporations was not unitary with the business that ASARCO conducted in Idaho); *Allied Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 787-790 (1992) (concluding that New Jersey had violated the Commerce Clause and Due Process Clause by attempting to impose corporation income tax with respect to Allied Signal's capital gain income from the sale of subsidiary stock because the business of the subsidiary corporation was not unitary with the business that Allied Signal conducted in New Jersey); and *F. W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 369-373 (1982) (concluding that New Mexico had violated the Commerce Clause and the Due Process Clause by attempting to impose corporation income tax with respect to the dividend income that Woolworth received from its subsidiary corporations because the business of the subsidiary corporations was not unitary with the business that Woolworth conducted in New Mexico). Those appeals are patently distinguishable from this matter in that the taxpaying corporations all conducted business in the state seeking to impose its corporation income tax. In this matter, Crown did not conduct any business in Maryland. (R. at E33.)

In a few appeals, this Court sanctioned the taxation of income earned by a corporation wholly outside a state's borders. *See Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 173-175 (1983) ("[W]e conclude that California's application of the unitary business principle to appellant and its foreign subsidiaries was proper, and that its use of the standard three-factor formula to apportion the income of that unitary business was fair."); and *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994). In those appeals: 1) the taxpaying

entity was a corporation that physically conducted business within the taxing state; 2) the taxing state had legislatively authorized and required combined unitary reporting for all corporate taxpayers; and 3) the taxpayer computed its tax by combining the income of all of its affiliated unitary corporations and apportioning that combined income by applying a combined apportionment factor. *Container Corp.*, 463 U.S. 159; and *Barclays*, 512 U.S. 298. In those three respects, this matter is distinguishable. First, the Comptroller assessed Crown, a non-domiciliary corporation that did not conduct business in Maryland, as the taxpaying entity (based on the Comptroller's conclusion that Crown had a unitary relationship with Parent, a separate-company taxpayer). (App. at 115a.) Second, Maryland's Tax statute requires that all corporations report and compute income, apportionment factors and Tax on a separate-company basis (as opposed to a combined unitary basis). Md. Code Ann., Tax-Gen. §§ 10-402 and 10-811; *see also Chesapeake Industries, Inc. v. Comptroller*, 59 Md. App. 370, 381-383 (1985). Third, the Comptroller required Crown to compute its separate-company Tax liability by applying the separate-company apportionment factors of Parent to the separate-company income of Crown. (App. at 115a; R. at E36.) The Comptroller's ad hoc Assessment of a separate-company corporation income tax with respect to a non-domiciliary corporation that the Comptroller concluded was a unitary affiliate of an in-state taxpayer is not constitutionally permissible under the Commerce Clause and the Due Process Clause. Further, the Comptroller violated the Commerce Clause by computing Crown's assessed separate-company tax using the separate-company apportionment factors of a different corporation.

Therefore, the decision of the Court of Appeals conflicts with the prior decisions of this Court regarding the unitary business principle. Thus, this Court should grant this petition

for a writ of certiorari either to: 1) review the decision of the Court of Appeals to determine if it violates the United States Constitution; or 2) review the decision of the Court of Appeals to resolve the apparent conflict between the decision of the Court of Appeals and the prior decisions of this Court.

III. This Court should grant this petition because the decision of the Court of Appeals conflicts with the prior decisions of this Court with respect to the issue of whether the imposition of a state corporation income tax violates the Commerce Clause under the Complete Auto Transit test.

Through its decision, the Court of Appeals determined that the Comptroller's Assessment with respect to Crown did not violate the Commerce Clause. In determining whether the imposition of a state corporation income tax violates the Commerce Clause, this Court has consistently applied the test that this Court set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (hereinafter referred to as the "*Complete Auto* test"). The Court of Appeals, however, did not apply the *Complete Auto* test in making its determination regarding the Commerce Clause with respect to Crown. (App. at 2a-44a.) A Commerce Clause analysis that fails to apply the *Complete Auto* test is constitutionally insufficient. Moreover, had the Court of Appeals applied the *Complete Auto* test (i.e. the proper Commerce Clause analysis), it should have concurred with the lower courts in Maryland that the Comptroller did not have jurisdiction under the Commerce Clause to subject Crown to Tax.

In *Complete Auto Transit*, this Court held that the Commerce Clause requires the following with respect to the imposition of a state corporation income tax:

> [1] the tax is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.

430 U.S. at 279.

That four-part test has been consistently applied by this Court in determining the validity of state taxes with respect to the Commerce Clause. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 227-228 (1980); *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 310-311 (1994); *Itel Containers International Corporation v. Huddleston*, 507 U.S. 60, 73-74 (1993); *Trinova Corp. v. Michigan Department of Treasury*, 498 U.S. 358, 372 (1991); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 (1996); and *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995).

Although the Court of Appeals appeared to consider whether Crown had established nexus with Maryland (i.e. concluding that nexus can be established by the physical presence of a unitary affiliate within Maryland), the Court of Appeals failed to consider whether Crown had *substantial* nexus with Maryland as prescribed under the *Complete Auto* test. (App. at 2a-44a.) In particular, the Court of Appeals ignored the fact that Crown was not physically present in Maryland. This Court has never permitted the imposition of a state tax with respect to a corporation that was not physically present within the taxing jurisdiction. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Exxon*, 447 U.S. 207; and *Quill*, 504 U.S. 298. Moreover,

this Court has specifically held that physical presence is a prerequisite to the imposition of a sales and use tax under the Commerce Clause. *See Quill*, 504 U.S. at 318. Although the Tax in issue in this matter is a corporation income tax rather than a sales and use tax, a corporation income tax should not be treated differently with respect to the Commerce Clause. In other words, "substantial nexus" with respect to a corporation income tax should be no different from "substantial nexus" with respect to a sales and use tax. In addition, the Court of Appeals ignored the fact that Crown's business was not being conducted in Maryland by Parent (i.e. Parent did not protect, maintain or manage Crown's intellectual property in Maryland). Instead, the nexus determination of the Court of Appeals was based solely on the Court of Appeals' conclusions that Parent was affiliated and unitary with Crown and that Parent conducted its own business in Maryland. That justification for imposing Tax with respect to Crown is insufficient to establish "substantial nexus" under the Commerce Clause. Therefore, Crown does not have substantial nexus with Maryland and the Comptroller's Assessment of Tax violates the Commerce Clause.

In addition, the Court of Appeals did not consider whether the apportionment method used by the Comptroller to compute the Tax assessed against Crown was fair as prescribed under the *Complete Auto* test. This Court has determined that an apportionment method is fair only if it is both externally and internally consistent. *See Container*, 463 U.S. at 169-170. External consistency requires that an apportionment formula "actually reflect a reasonable sense of how income is generated." *Id.* Thus, this Court has approved apportioning a separate-company's income with that separate-company's apportionment factors.

See, e.g., Exxon, 447 U.S. 207; and *Mobil*, 445 U.S. 425. Moreover, this Court has approved apportioning the combined income of several corporations with the combined apportionment factors of those same corporations. *See Container*, 463 U.S. 159; and *Barclays*, 512 U.S. 298. This Court has never approved apportioning the separate-company income of one corporation with the separate-company apportionment factors of a different corporation. That apportionment methodology is incongruous and inherently fails to reflect how the income of an entity is generated. Thus, the Comptroller's Assessment of Tax fails the external consistency test and thus, violates the Commerce Clause.

Internal consistency exists when an apportionment formula, if applied by every jurisdiction, results in the taxation of no more than one hundred percent of a corporation's income. *See Container*, 463 U.S. at 169. If every state could require Crown to: 1) file a corporation income tax return and pay corporation income tax based on the fact that a unitary affiliate(s) of Crown was doing business in the state; and 2) apportion its income using the separate-company apportionment factors of the in-state affiliate(s); then, substantially more than one hundred percent of Crown's income could be taxed depending on the number of its unitary affiliates and the number of states in which those affiliates conducted business. Therefore, the Comptroller's Assessment of Tax fails the internal consistency test and thus, violates the Commerce Clause.

In this matter, a proper application of the *Complete Auto* test establishes that the Comptroller's Assessment of Tax violates the Commerce Clause. Therefore, this Court should grant this petition for a writ of certiorari so that the proper

Commerce Clause analysis can be applied with respect to this matter.

IV. This Court should grant this petition because the decision of the Court of Appeals conflicts with prior decisions of this Court regarding the jurisdictional limitations of the Due Process Clause.

Through its decision, the Court of Appeals determined that the Comptroller's Assessment of Tax with respect to Crown did not violate the Due Process Clause. In making that determination, the Court of Appeals ignored settled law with respect to the limitations imposed by the Due Process Clause. This Court has determined, on numerous occasions, that the Due Process Clause requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Company v. Maryland*, 347 U.S. 340, 344-45 (1954); *see also International Shoe v. Washington*, 326 U.S. 310, 316 (1945); and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In *Burger King v. Rudzewicz*, this Court held:

> ["It] is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." . . . Thus where the defendant "deliberately" has engaged in significant activities within a State, Keeton v. Hustler Magazine, Inc., supra, at 781, or has created "continuing obligations" between himself and residents of the forum, Travelers Health Assn. v. Virginia, 339 U.S., at 648, he manifestly has availed himself of the privilege of conducting business there, and because

> his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

471 U.S. at 475-476.

In *Quill Corp. v. North Dakota*, this Court held:

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis.

504 U.S. at 312.

Based on that consideration, this Court concluded that a corporation is "on notice" that it is subject to a state tax if it maintains a physical presence within a state or if it purposely avails itself of the benefits, protections or economic market of a state. *See id.* at 308. Thus, this Court acknowledged that it would not violate the Due Process Clause for a state to subject a non-domiciliary corporation to tax if that corporation engaged in widespread and continuous solicitation of business into the state, even though that corporation was not physically present within the state. *Id.* In this matter, Crown was not physically present in Maryland. (R. at E36.) In addition, Crown did not avail itself of any benefits or protections of Maryland nor did it attempt to

exploit the economic market of Maryland. Moreover, Crown did not utilize the infrastructure, the labor market, the consumer market or any other attributes of Maryland. Thus, it is unreasonable to expect Crown, a non-domiciliary corporation that did not physically conduct business in Maryland and did not purposefully direct any activities into Maryland, to be "on notice" that it should file annual and quarterly Tax returns and make annual and quarterly payments of Tax. The imposition of Tax with respect to Crown is unfair because Maryland did not provide any benefits, protections or opportunities to Crown and thus, the imposition violates the Due Process Clause and is in direct conflict with prior decisions of this Court. Thus, this Court should grant this petition for a writ of certiorari to resolve that conflict.

CONCLUSION

For the reasons stated in this petition, Crown respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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